

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**

[REDACTED]

V

**Patsy's Inc**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:43 V unpaid vacation pay/earned time/paid time off  
RSA 275:43-b unpaid salary

**Date of Hearing:** March 21, 2016

**Case No.:** 52184

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts he is owed \$9,360.00 in unpaid salary and earned time pay from October 28, 2015 through the filing on his claim on January 19, 2016. He claims he left work on a work related injury and the employer incorrectly depleted his available earned time/paid time off to pay his salary.

The claimant could not state how much was due for the categories of earned time pay/vacation time pay and unpaid salary, nor could he explain how he arrived at the amount of the claim of \$9,360.

The claimant has filed a Workers Compensation injury claim. As of the date of this hearing, the claim has been denied.

The employer denies the claimant is due any paid time off (PTO)/earned time pay or salary. The employer paid the claimant for four weeks during which he did not perform any work because he was on a personal leave of absence. Though the claimant had only one day of earned time, they paid the full four weeks because he was a longtime employee. Further, when the claimant did return to work on a limited basis of four hours per week, they continued to pay his full regular weekly salary of \$1,300 for several weeks, until they notified him he was being changed to an hourly rate.

**FINDINGS OF FACT**

The claimant worked for the employer for over thirty years, with at least two breaks in service, and is still employed as of the date of the hearing.

The claimant is unclear as to the exact events on the day of October 27, 2015, his last day of work prior to a four week absence. He recalls saying "I'm outta here" to

two coworkers, but does not think he meant he was quitting. He had two prior “blow ups” at work and told Joe Alosa, the owner, that he “can’t seem to keep my cool.”

After a conversation with Tony, a coworker, the claimant called Mr. Alosa to make sure he had not quit and was taking a leave of absence. Mr. Alosa told the claimant not to worry about his wages while he was out on a personal leave of absence.

The claimant has several conversations with Mr. Loughry during his four week absence, one of which resulted in the employer temporarily suspending the claimant’s company issued cell phone service because the claimant made verbal claims he was still working during his leave of absence by being on call and answering the phone. This angered the claimant because he also used the company issued cell phone for personal use as he had no other phone service.

The claimant performed no work between October 28, 2015 and November 29, 2015, and received his full regular salary of \$1,300. The employer did apply his one remaining day of earned time for this four week period during which he performed no work. The employer paid the remainder of the four week period in good will because he was such a longtime employee.

The claimant agrees he only had one day of earned time as of October 27, 2015, however, he argues because the employer used the term “PTO” on his paystubs even after that day had been used, he must have had that time accrued to his benefit. He now argues he is due seven weeks of PTO pay at \$1,300 per week. He could not articulate the time period for this claim.

The claimant’s argument that he is due seven weeks of PTO pay because the employer chose to use that terminology on his paystub is not persuasive. The parties agree the claimant has only one PTO day in his bank on October 27, 2015. The employer paid the claimant for weeks in which he performed no work, through November 29, 2015, and used the PTO line item on the paystub because he was indeed on Paid Time Off. The PTO used did not come from his available bank, but from the goodwill of the employer. The claimant had not earned it and the employer credibly testified they did not put his PTO accrual bank in the negative for this time they voluntarily paid to him.

The claimant’s subsequent argument that the employer could not use PTO to pay his salary because he had a company issued cell phone and was available to take calls and therefore working, even though he did not report to the office between October 28, 2015 and mid-November 2015, when the employer suspended his cell phone service, is also not persuasive. The claimant did not provide any credible or persuasive testimony or evidence that he did perform work during this period or that the employer incorrectly paid his salary using PTO.

Therefore, the Hearing Officer finds the claimant fails to prove by a preponderance of the evidence he is due any paid time off pay/earned time pay/vacation pay.

The claimant further argues the employer wrongfully changed his pay from a weekly \$1,300 salary to an hourly rate of \$32.50 without notifying him or seeking his approval. He seeks the difference between the hourly rate and the full salary rate beginning with the pay date of January 14, 2016.

The employer originally asserted, through the filing of the objection, that Mr. Alosa had verbally notified the claimant of the change from salary to hourly.

The employer's pay week begins Monday and ends Sunday, with pay day on the first Thursday following the end of the pay period.

The claimant provided credible testimony that he did not receive any verbal or written notification that the employer changed his rate of pay until January 15, 2016, when he received his pay check for hours worked the week of January 4 through January 10, 2016, dated January 14, 2016. He received \$130 for hours worked at \$32.50 per hour, rather than his regular \$1,300 salary. He received \$390 for hours worked the work week, January 11 through January 17, 2016, in which he received the notification that his salary had been changed to an hourly rate, which the employer paid on January 21, 2016.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) and (c) require that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification. Nothing in the statute requires an employee agree to any change in the rate of pay, only that they receive notice of the change prior to the effective date of the change.

The Hearing Officer finds the employer failed to properly notify the claimant of the change in his rate of pay, prior to the change taking effect, as required by Lab 803.03 (c) and failed to maintain on file a copy of the signed notification as required by Lab 803.03 (f).

The employer did notify the claimant via his pay stub on January 14, 2016, which the claimant saw on January 15, 2016. This notification prompted the claimant to speak with Mr. Alosa regarding the issue and the claimant memorialized his displeasure with this decision in an email on January 15, 2016, previously submitted.

The employer illegally changed the claimant's rate of pay as they failed to notice the claimant properly. The notification on January 14, 2016, provides notice for the employer to change the claimant's rate of pay no sooner than January 18, 2016, as the claimant was a salaried employee at the time of the notice, and therefore is due his full salary for a pay period in which he performs any work, pursuant to RSA 275:43-b:

- Pay period January 4 - 10, 2016, pay day January 14, 2016 paid \$130, due \$1,170 (\$1,300 - \$130); and
- Pay period January 11 - 17, 2016, pay day January 21, 2016 paid \$390, due \$910 (\$1,300 - \$390).

As of January 15, 2016, the claimant had notice that any hours worked in future pay periods would be paid at the hourly rate of \$32.50.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed salary for the pay periods ending January 10, 2016 and January 17, 2016, in the amount of \$2,080 (\$1,170 + \$910).

The employer asks for an offset against any wages found to be due as they paid several weeks of goodwill to the claimant which they were under no obligation to do. There simply is no statutory authority to award the employer an offset in the wages found to be due, against wages the employer paid as goodwill at an earlier date.

### **DECISION AND ORDER**

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43 V considers vacation pay/earned time pay/paid time off pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is due any vacation pay, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43-b requires that a salaried employee received their salary, in full, for any pay period in which they perform any work, and as this Department finds that the claimant proved by a preponderance of the evidence that he was not paid all wages/salary due, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$2,080 (\$1,170 + \$910).

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$2,080, less any applicable taxes, within 20 days of the date of this Order.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: March 30, 2016

Original: Claimant  
cc: Employer  
Attorney

MJD/aph